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DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

10,698

FILE: B-195049

DATE: July 9, 1979

MATTER OF: Douglas Studs, Inc. DL6702095

[Request for Contract Modification]

DIGEST:

Where Forest Service error in estimating acreage covered by Timber Sale results in approximately 45 percent undercut, timber sale contract may be modified to indicate acreage actually involved. Overcharges which resulted from error may be refunded.

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The United States Department of Agriculture Forest Service requests reformation of the Park Creek No. 3 Timber Sale contract awarded to Douglas Studs, Inc. (Douglas). Douglas was apparently overcharged for the timber purchase because of a miscalculation of the acreage contained in the sale.

The Park Creek No. 3 Timber Sale in the amount of \$26,255.67 was awarded on a lump-sum payment basis for each of 15 separate units contained in the sale. The contract indicates that the fifteen units cover a total of approximately 240 acres with estimated total sale volume of 1,121 million board feet of various timber species. Shortly after commencing logging operations, Douglas advised the Forest Service of its concern that the Park Creek No. 3 sale was going to undercut. Since operations had just begun, both Douglas and the Forest Service decided not to take any action pending the completion of cutting in some of the units. On completion of the work, Douglas advised the Forest Service of an undercut of approximately 45 percent and requested a refund of \$11,662.10. The Forest Service denied this request, stating it was not authorized to modify the contract.

The sale in question was part of the fiscal year 1975 offering program for the Rio Grande National Forest. The agency explains that preliminary work on the sale was begun in the spring of 1974 and

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completed at the end of that year. Prior to the completion of "sale layout, marking, and area and volume determinations," the agency conducted a "show-me-trip" in which Douglas participated. No trips were conducted after final work on the sale was completed, so that Douglas apparently relied on the accuracy of the Forest Service surveys and volume estimates contained in the offering.

In response to Douglas' request that the Forest Service review the situation, the Park Creek timber sale volumes were rechecked whereby it was determined that the acreage in the contract was significantly overstated. For example, an estimated 240 acres were included in the sale, but the recomputation showed only approximately 127 acres were actually covered. Apparently the estimated timber volume per acre over various areas was accurate.

In prior decisions, we have permitted modification of the contract price where there has been an erroneous representation of a material fact by the Government concerning the work to be done. For example, in L. Z. Hizer, B-188785, May 23, 1977, 77-1 CPD 357, we permitted reformation of a timber sale contract where the timber purchaser erroneously relied on an incorrect volume designation made by the Forest Service. The legal principles to be applied in these cases is as follows:

"It has been held that where, in connection with a Government contract, the Government apparently negligently misstated a material fact and thereby misled the plaintiff to its damage, and where the plaintiff was negligent in not discovering the misstatement and ascertaining for itself what the facts were before submitting its bid, the position of the parties is that of persons who have made a mutual mistake as to a material fact relating to the contract and the court should therefore, in effect, reform the contract by putting them in the position they would have occupied but for the mistake. Virginia Engineering Co., Inc. v. The United States, 101 Ct. Cl. 516. The general rule is that a contract made through mutual mistake

as to material facts may either be rescinded or reformed. See 12 Am. Jur., Contracts, Sec. 126 and 17 C.J.S., Contracts, Sec. 144. Further, it is an additional rule that mistake on one side and misrepresentation, whether wilful or accidental, on the other, constitute a ground for reformation where the party misled has relied on the misrepresentation of the party seeking to bind him. 76 C.J.S., Reformation of Instruments, section 29. Restitution in these circumstances may be obtained on the premise that it would be unjust to allow one who made the misrepresentation, though innocently, to retain the fruits of a bargain which was induced, in whole or in part, by such misrepresentation. See Williston on Contracts, Rev. Ed., sections 1500 and 1509 and the cases therein cited." L. Z. Hizer, supra; See also, Morgan Roofing Company, 54 Comp. Gen. 497 (1974), 74-2 CPD 358.

This contract may be modified on the basis of mutual mistake. In his report to the Forest Service Supervisor, the Timber Sale Officer for the Rio Grande National Forest suggests four alternative methods for determining the final volume of the sale to be used as the basis for satisfying this claim. In providing relief by contract reformation, the objective is to place the injured party in the position they would have occupied but for the mistake in the sale preparation work. Virginia Engineering Co. v. United States, 101 Ct. Cl. 516 (1944). It appears that the Timber Officer's recommendation, Alternative No. 1, satisfies this objective. It determines the value of the timber and the proper sale price by using the recalculated acreages, but still applies the original per acre volumes by species and payment unit since their validity are not at issue. However, we would limit the refund to \$11,662.10, the amount claimed by Douglas.

*The modification should indicate the acreage actually involved and overcharges which resulted from error may be refunded.*

Deputy

*R. J. K. 114*  
Comptroller General  
of the United States